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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 990

MORTON FRIEDMAN,

Petitioner,

v.

LEWIS B. SCHWELLENBACH, individually and as Secretary of Labor, HARRY B. MITCHELL, FRANCES PERKINS and ARTHUR S. FLEMMING, individually and as members of the Civil Service Commission.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The petitioner respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia to review a judgment of that Court of December 16, 1946.

Opinions Below

The opinion of the District Court for the District of Columbia (R. 62-71) is reported at 65 F. Supp. 25. The Court of Appeals for the District of Columbia affirmed the judgment on December 16, 1946 (R. 77). Its opinion (R. 73-76) is as yet unreported.

Jurisdiction

The jurisdiction of this Court to review the judgment of the Court of Appeals is based upon the Judicial Code, Section 240(a), 28 U. S. C. Section 347(a).

Statement of Facts

Petitioner, a natural born citizen of the United States, was employed continuously for nine years in Washington, D. C., by various agencies of the United States Government in different capacities (R. 28). Commencing in 1935, as a research assistant in the Federal Works Agency at $2,000 per year, petitioner advanced in positions of increased responsibility in that agency (R. 29). In 1942 he joined the staff of the Office for Emergency Management and later the War Manpower Commission, whose functions have since been transferred to the Department of Labor (Exec. Order No. 9617, Sept. 17, 1945, 10 F. R. 11929). By 1944, at the time of the termination of employment complained of herein, he was chief of the Classification Division of the War Manpower Commission, responsible for assuring that the positions of the employees of that Commission were properly allocated in accordance with various salary classification statutes (R. 30). During the entire course of his nine years of Government employment, petitioner performed highly satisfactory services and was at all times rated "very good" or "excellent" in the efficiency ratings required by law (R. 28-30). During the pendency of the Civil Service Commission proceedings leading to his dismissal, the two agencies for which he worked repeatedly and firmly opposed his discharge (R. 31-33, 38).

Effective as of September 12, 1944, petitioner was discharged from his position with the War Manpower Commission at the direction of the Civil Service Commission (R. 31). The reasons which the Civil Service Commission

offered to support its direction are stated in the following letter (R. 34-35):

"UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C.

File BAR:JFE:GD

June 5, 1944

Mr. Morton Friedman
c/o Personnel Office
War Manpower Commission
Washington, D. C.

My dear Mr. Friedman:

Reference is made to your appearance before the Commission on April 19, 1944, in further prosecution of your appeal from the finding of ineligibility for continuance in the service.

The Commission has given most careful consideration to your case including the information developed during the course of the investigations which were made and the testimony before the Board of Appeals and Review at the hearing which was accorded you. Particular attention, however, has been given to your statements and based upon those statements the Commission has concluded that the finding of ineligibility was in accordance with the standards applied in such cases and therefore has affirmed the previous action.

The Commission's action was based mainly on your activities in connection with the American Peace Mobilization and your shift in attitude and point of view following the declaration of war between Germany and Russia. It may be true that many members of the American Peace Mobilization were not aware that it was Communist-dominated and pro-Communist but it is generally recognized that those who were prominently and actively affiliated with that organization were people who over a period of time had shown sympathy with the Communist cause. Your testimony was that you were sent to the first meeting of the American Peace Mobilization in Chicago as a representative of your local union; that you also were sent to a meeting of the organization in New York City as a delegate, and that you participated actively in their meetings and

affairs. You also testified that you were active in the affairs of the Washington Peace Mobilization and served on several of its committees.

You were admittedly opposed to the United States participation in war before the invasion of Russia by Germany but thereafter you changed your mind and were of the opinion that this country should fight along with the other United Nations. Just how long it was before Pearl Harbor that you changed your mind is not definitely established, but on the occasion of your appearance before the Commission you indicated that it was probably in August of 1941, which obviously was soon after June 22, 1941.

These matters, together with other activities which have been personally discussed with you, are convincing to the Commission that you are not eligible for retention in the service according to the standards observed by the Commission.

By direction of the Commission:

Very respectfully,

s/ WM. C. HULL
Executive Assistant."

In short, because of petitioner's views concerning the proper course for his country to follow with respect to a war in which it was not yet engaged, and because petitioner participated actively in an organization which held those views, the Civil Service Commission declared him ineligible for Government service. The characterization of the organization as "Communist-dominated or pro-Communist" and the inference that those active in the organization were people who "had shown sympathy with the Communist cause" must be considered in the light of the fact that no charge or finding was made that petitioner was a member of the Communist Party; or that he advocated the overthrow of the Government of the United States; or that he belonged to any organization which advocated the overthrow of the Government of the United States. Section 9A(1) of the Hatch Act is the statute which forbids the

employment of persons having membership in organizations advocating the overthrow of the Government,[1] and the Government in its answer specifically "admit[s] that * * * petitioner * * * was not charged with having violated any of the provisions of the Hatch Act" (R. 23, Par. 9). Nor did the Civil Service Commission charge that the American Peace Mobilization was an unlawful organization, or that espousal of its views constituted an unlawful act. Indeed, the somewhat dubious source of the Commission's views concerning the character of that organization attributes to it a membership of 14,000,000 persons.[2]

Efforts of Petitioner's Employing Agencies to Retain Him

The action of the Civil Service Commission in directing petitioner's discharge culminated more than eighteen months of sharp disagreement over petitioner's eligibility not only between that Commission and the two Government agencies for which petitioner worked, but also within the Commission itself. The following events marked this dispute.

In or about October, 1942, while petitioner was employed by the Office for Emergency Management, the Civil Service Commission directed that Office to terminate his services (R. 31). That Office reviewed the Commission's charges,

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[1] The full text of Section 9A(1) is as follows:

> "It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States." 53 Stat. 1148, 18 U. S. C. § 61(i)(1).

[2] See Special Committee on Un-American Activities, House of Representatives, 78th Cong. 2d Sess., *Investigation of Un-American Propaganda Activities in the United States* (Vol. 17, pp. 10282-10284).

as well as the findings resulting from an extensive investigation conducted by its own investigating division, and officially declared that the facts asserted by the Commission did not justify a dismissal (R. 32). Furthermore, it determined that it would be to the best interests of the Government to retain the plaintiff in its employ (R. 32). The Office for Emergency Management, therefore, formally appealed the order to the Board of Appeals and Review of the Commission (R. 32).

The Board of Appeals and Review which held a hearing on January 26, 1943, is a purely advisory body, subordinate to the Commission. Under the procedure on a hearing before that Board, as applied in this case, no evidence is submitted against the employee. The case against him is based entirely upon an investigator's report which is kept in the secret files of the Commission, is never shown or read to the employee, and like all such reports consists entirely of investigator's summaries of alleged statements by anonymous and unsworn "confidential" informants (R. 37).[3] Although the Court below stated that petitioner "was accorded the fullest opportunity to present his case and availed himself fully of the opportunity" (R. 76), petitioner was in fact given no opportunity to con-

[3] The record of the "hearing" in this case contains the following statement by the Chairman of the Board of Appeals and Review:

> "Incidentally we have no more information than you do as to who the witnesses were, except in a very few isolated cases, and we don't know in some respects just how they came into possession of the information which they had given. It is not our investigation" (R. 37).

Petitioner regrets his inability to include in the record on this petition a transcript of the hearing before the Board of Appeals and Review. While he and his representative were allowed to see the transcript in the offices of the Commission and to transcribe some excerpts therefrom, the Commission by letter of January 11, 1945 specifically denied permission to make a copy of the transcript (R. 39, 42-43). The remainder of the record on which the Commission acted is, as noted above, in its secret files and was never made available to petitioner or his counsel.

front or cross-examine the informants against him or against the American Peace Mobilization.[4]

Petitioner did, however, present substantial and reliable evidence by public officials who, knowing his political views, testified that he was a loyal, devoted and efficient public servant[5] (R. 37-39). So convincing was this evidence that the Board of Appeals and Review concluded that petitioner should not be dismissed and so recommended to the Civil Service Commission[6] (R. 32).

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[4] Conceded by the Government in its brief below, p. 23.

[5] Testimony to this effect was given by (R. 37-38):

Charles N. Mills, Director of Personnel, Office for Emergency Management, officially representing his agency;

Richard W. Cooper, Chief of Personnel, War Manpower Commission, previously with the Office for Emergency Management, officially representing his agency;

Lester L. Evans, Acting Director of Personnel, Federal Works Agency;

Major Fred Zappolo, formerly Director of Personnel, Work Projects Administration, and at the time of hearing, engaged in personnel work in the Quartermaster Corps;

Jay W. Murphy, formerly on the personnel staff of the Works Projects Administration, and at the time of the hearing, engaged in confidential work in the Navy Department;

George Hamson, Assistant Director of Personnel, Office for Emergency Management; and

John Ashman, Chief of Classification Division, Office for Emergency Management.

In addition, letters were presented from Captain Arthur Schraeger, formerly on the personnel staff of the Works Projects Administration, and at the time of his letter engaged in personnel work in the Quartermaster Corps, and Elbert W. Smith, Assistant Director of Personnel, Farm Credit Administration (R. 38).

[6] This was revealed for the first time to petitioner by an admission of counsel for the Commission in response to a question by the District Court at oral argument on the Government's motion to dismiss the complaint. But for the Court's question, the secret character of the record before the Commission would have resulted in the withholding of this vital information from the petitioner and the Court.

The character of the record conceals from petitioner and the Court information of a similar nature, such as whether the Commissioners were unanimous in their determination to dismiss him.

The Commission, however, reasserted its conclusion that petitioner should be dismissed. By this time, petitioner was employed by the War Manpower Commission, to which he had been transferred as the result of a departmental reorganization. The War Manpower Commission referred the matter to a committee of its responsible officials, including its General Counsel (R. 32-33). On the basis of the findings of this committee it concluded, as had the Office for Emergency Management and the Civil Service Commission's Board of Appeals and Review, that the facts found concerning petitioner did not justify his dismissal (R. 33). Since the War Manpower Commission, too, found petitioner's services essential, it requested the Civil Service Commission to reconsider its action (R. 33). Duly authorized officials of the War Manpower Commission held many conferences with the Civil Service Commissioners on the case (R. 33). Finally, on April 19, 1944, the Personnel Director of the War Manpower Commission appeared in person on behalf of his agency, together with petitioner, before the three members of the Civil Service Commission in a further appeal of the case (R. 33).

In spite of the independent investigation, findings and firm requests of the Office for Emergency Management and the War Manpower Commission, the Civil Service Commission persisted in its conclusion and directed that petitioner be dismissed. The War Manpower Commission, believing that legally it had no choice but to comply with the direction, finally acceded thereto and separated petitioner from its service (R. 33).

Court Proceedings

Having exhausted his administrative remedies (R. 66), petitioner brought this action for a declaratory judgment that he was unlawfully dismissed from Government employment, for an order directing his reinstatement, for an injunction against interference with such reinstatement or other Government employment, and for supplementary re-

lief. The petitioner urged that the action of the Civil Service Commission was unlawful, in that it violated the First and Fifth Amendments to the Constitution; the provisions of Section 9(a) of the Hatch Act guaranteeing Federal employees the right to freedom of opinion; the Civil Service Act and Civil Service Rule I, Section 2, protecting Government employees against discrimination because of their political opinions; and the statutes recognizing the right of Government agencies such as the War Manpower Commission to make their own determinations concerning the retention of their employees free from direction by the Civil Service Commission or any other agency. The Government answered, justifying the action on the ground that petitioner's appointment to the Office for Emergency Management and to the War Manpower Commission were made "subject to investigation" (R. 25), that such an appointment reserved to the Civil Service Commission the authority to direct his dismissal, and that the dismissal was justified because the Commission's letter indicated a finding that there was "reasonable doubt as to the loyalty" of the petitioner, a ground for dismissal under War Service Regulation II, Section 3 (R. 25).

On motions for summary judgment, the District Court granted judgment for the Government, dismissing the complaint. The District Court found that the Commission was within its rights in holding that there was a reasonable doubt as to the petitioner's loyalty. It stated:

> "It can hardly be said that there could be no reasonable doubt of the loyalty of the member of a communist organization who opposed war against Germany so long as this country was an ally of Great Britain, a democracy, but became on advocate of war when this country became allied with Russia, a communistic and totalitarian state" (R. 70).

In dealing with the rights of Government employees to freedom of opinion, the Court stated:

> "The plaintiff has not been denied the right to express his opinions, but if his opinions as expressed and

> his conduct in conformance with those opinions have raised a reasonable doubt in the minds of the Commission of his loyalty, there is nothing in the Hatch Act that would prevent his removal from office" (R. 70).

The District Court also ruled that because the plaintiff was not regarded as falling within the "classified competitive civil service" he could not object to the direction from the Civil Service Commission to his employing agency, the War Manpower Commission (R. 70).

On appeal to the Court of Appeals for the District of Columbia, it affirmed the judgment of the District Court, but on a different ground. It did not consider the applicability of the statutory provisions urged as rendering unlawful the Commission's finding. It stated, indeed:

> "It is beyond our province, and it was beyond the province of the District Court, to review the finding of the Civil Service Commission that it had a reasonable doubt as to whether Friedman was loyal to the Government, because it has long been held that the courts will not review managerial acts, not clearly arbitrary, of executive officials performed within the scope of their authority, and will not substitute their judgment in such matters for that of the officials" (R. 76).

For this conclusion it cited *Decatur* v. *Paulding*, 39 U. S. (14 Pet.) 496, 515, and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131-132 (R. 76).

The present petition seeks review of this decision.

Questions Presented

1. Did the Court of Appeals err in refusing to determine whether the petitioner's constitutional and statutory rights of freedom of speech and opinion were violated by his dismissal from the Government service?

2. Did the dismissal of petitioner from the Government service violate specific statutory guarantees of freedom of speech and opinion granted to Federal employees?

3. Did the dismissal of petitioner from Government service violate the petitioner's constitutional rights of freedom of speech and opinion?

4. Did the standard of loyalty applied by the Civil Service Commission to cause the petitioner's dismissal violate the petitioner's rights of freedom of speech and opinion as granted by the Constitution and by statute?

5. Did the Civil Service Commission have authority to compel the War Manpower Commission, petitioner's employer, to dismiss petitioner, when the War Manpower Commission believed and had determined that the petitioner should be retained in its employ and that he was not disqualified from such employment?

Constitutional Provisions, Statutes, Rule and Regulation Involved

Petitioner asserts that his dismissal was in violation of the First and Fifth Amendments of the Constitution of the United States and of certain statutory provisions protecting Federal employees.

Section 2 of the Civil Service Act, Act of January 16, 1883, 22 Stat. 403, 5 U. S. C., Section 633, provides:

> "It shall be the duty of said commissioners (i.e., Civil Service Commissioners):
>
> "First: To aid the President, as he may request, in preparing suitable rules for carrying this Act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modification thereof into effect.
>
> Second: Among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:
>
> * * * * * *
>
> Fifth: No person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and

that he will not be removed or otherwise prejudiced for refusing to do so.

Sixth: No person in said service has any right to use his official authority or influence to coerce the political action of any person or body."

Pursuant to the said statutory provisions,[7] the President, by Executive Order, has promulgated as part of the Civil Service Rule I, Section 2, the following (Executive Order No. 8587, Nov. 7, 1940, CFR, Cum. Supp. 1943, Book 2, p. 1439):

"No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of an applicant, eligible, or employee in the classified service because of race, or his political or religious opinions or affiliations, except as may be authorized or required by law."

Section 9(a) of the Hatch Act, Act of August 2, 1939, 53 Stat. 1148, 18 U. S. C., Sec. 61h, as amended by Act of July 19, 1940, Section 2, 54 Stat. 767, provides:

"All such persons (i.e., officers or employees in the executive branch of the Federal Government, or any agency or department thereof) shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates."

Civil Service Commission War Service Regulation II, Section 3 (promulgated by the Commission's departmental circular No. 323, February 28, 1942), provides as follows:

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[7] See "Civil Service Act, Rules and Regulations Annotated" (U. S. Civil Service Commission, 1943), p. 216.

"An applicant may be denied examination and an eligible may be denied appointment for any one of the following reasons:

* * * * * *

"(g) a reasonable doubt as to his loyalty to the Government of the United States;

* * * * * *

"Any of the reasons stated in the foregoing subdivisions from (b) through (h) inclusive, shall be sufficient cause for removal from the service."

Reasons for Granting the Writ

This case presents important questions concerning the tenure and removal of Civil Service employees which have not been, but should be, settled by this Court. It raises fundamental questions of the power of the Federal District Courts with respect to violations of law relating to Federal personnel. The issues raised are related to those which were before the Court in *United States* v. *Elchibegof*, No. 442, this term; they involve "civil servants' rights of tenure" which the Government characterized as "matters of substance" in its petition for a writ of certiorari in that case. Further, the opinion of the court below conflicts with the decision of this Court in *Wickersham* v. *United States*, 201 U. S. 390, and with Section 10 of the Administrative Procedure Act, 60 Stat. 237.

The present case also involves important questions of freedom of speech and opinion under the Constitution and the statutes guaranteeing these rights to Federal employees. The question of the scope of standards of loyalty which may be applied to Government employees here presented is of great current interest and is even now receiving consideration by a Presidential commission.[8]

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[8] Exec. Order 9806, Nov. 25, 1946, 11 F. R. 13,863. There have been other government bodies considering this matter. Report of House Civil Service Sub-Committee pursuant to HR 66, 79th Cong., 1st Sess., Cong. Rec., July 20, 1946, pp. 9728-9730.

One aspect of the problem was recently before this Court in *United States* v. *Lovett*, U. S. , 66 S. Ct. 1073 (1946), which involved an attempted legislative ouster of three employees from the Government service because of their political views and affiliations. The present case concerns the same basic problem, except that the ouster was at the direction of an executive agency, the Civil Service Commission.

The case also presents questions concerning the power of the Civil Service Commission to impose standards of loyalty on other Government agencies which disagree with those standards, and to compel action by Government departments against their wishes and to the prejudice of the individual Federal employee.

I

In addition to the constitutional protections of freedom of speech and political opinion applicable to the citizenry generally, Federal employees have certain specific statutory protections as to the freedom of their political beliefs. These protections are contained in the Civil Service Act, an executive order pursuant to said Act which establishes a Civil Service Rule, and the Hatch Act.

The Civil Service Act, *supra* (p. 12), specifically provides that "No person in said (public) service has any right to use his official authority or influence to coerce the political action of any person or body". And Civil Service Rule I, Section 2, also quoted above, implements this protection by prohibiting inquiry into and barring discrimination because of "political or religious opinions or affiliations, except as may be authorized or required by law".

The Hatch Act expressly provides that all officers or employees in the executive branch "shall retain the right * * * to express their opinions on all political subjects and candidates" (*ibid.*).

Federal employees are thus given basic and important protections assuring their freedom of political opinion.

In this case it is undisputed that petitioner was dismissed at the Civil Service Commission's insistence solely because (1) he changed his mind between June and August of 1941 on the political issue of participation by this country in the war in Europe, and (2) he was affiliated with a lawful organization which expressed a point of view on this issue.

These grounds of dismissal are specifically proscribed by the statutes cited above guaranteeing to Federal employees their freedom of political opinion.

Since the petitioner was concededly dismissed because of his political views, and because of his membership in an organization—a method of expressing such views [9]—the case presents a question of substance and importance relating to the construction of statutes of the United States which has not been but which should be settled by this Court.

II

The Civil Service Commission has attempted to avoid the obvious violation of the statutory protections referred to above by claiming that the petitioner's views have raised a reasonable doubt as to his loyalty. The test of loyalty developed by the Commission and applied to Federal employees is that anyone who changed his mind in the summer of 1941 from opposing the participation of the United States in the war in Europe, to advocacy of such a step,

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[9] When President Roosevelt signed the Appropriation Act (57 Stat. 450) placing limitations upon the employment of Messrs. Lovett, Dodd and Watson, he expressed strong disapproval of such limitations, as follows:

> "There is no suggestion that the three named individuals have not loyally and competently performed the duties for which they have been employed. *They are sought to be disqualified for Federal employment because of political opinions attributed to them.*" H. Doc. 264, 78th Cong., 1st Sess. (1943), p. 1. Italics supplied.

Dr. Lovett had admitted membership, association or affiliation with the American Peace Mobilization, the very organization here in question (H. Rep. 448, 78th Cong., 1st Sess., 1943, p. 8). President Roosevelt obviously considered this as a form of expression of a political view.

would thereby be considered as being of doubtful loyalty. This test has been expressed in a public release of the Commission and in testimony of Commissioner Flemming before an appropriation subcommittee. See Hearings before Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 2d Sess. Independent Offices Appropriation Bill for 1945 (Dec. 9, 1943), pages 1083-1087.

We believe this test of loyalty is not only in direct violation of the statutory and constitutional protections referred to above, but improperly exceeds specific statutory standards of loyalty laid down by the Congress. The question of the loyalty of Government employees has been extensively considered by the Congress and the history of that consideration is recited in the opinion of this Court in *United States* v. *Lovett, supra,* 66 S. Ct. at 1075-1077. As a result of that consideration, the Congress adopted definite standards for the dismissal of Government employees it deemed disloyal. Those standards are set forth in specific statutory provisions. Section 9A of the Hatch Act (53 Stat. 1148, 1149, 18 U. S. C. Sec. 61(i)) prohibits the employment of persons belonging to organizations which advocate the overthrow of our constitutional form of Government. Appropriation statutes prohibit the payment of funds to employees who advocate the overthrow of the Government or who belong to organizations advocating such overthrow. See 66 S. Ct. 1075, note 2. These, together with the statutory oath of office (5 U. S. C., Sec. 16) to "support and defend the Constitution of the United States against all enemies, foreign and domestic", constitute a complete congressional code of qualification and disqualification for Federal employment on loyalty grounds. The exhaustive consideration given to the subject by the Congress clearly indicates that had it determined that further disqualifications were necessary it would have said so.

The Civil Service Commission, however, has exceeded the statutory grounds mentioned and added to them its own administrative test. The War Service Regulations were

promulgated by the Civil Service Commission itself under the authority of Executive Order No. 9063. In order to be valid, language in such War Service Regulation making "reasonable doubt as to loyalty" a ground for dismissal, must be construed as a shorthand restatement of the statutory prohibitions mentioned above. But the standards laid down by the Civil Service Commission are not a restatement of the Congressional standard. Thus, as to petitioner, it is admitted by the Government that he has not been charged with any violation of the Hatch Act (R. 23, par. 9). He has never been charged with advocacy of the overthrow of the Government. He has not been charged with failing to live up to his oath of office. And though there is no specific statutory prohibition thereof, it should be noted that petitioner has not been charged with being a member of the Communist Party. Petitioner has violated none of the statutory standards and yet is dismissed because of the Civil Service Commission's own administrative interpretation of the phrase "reasonable doubt as to loyalty".

The assertion of a right in the Commission to set up administrative tests of loyalty beyond those created by statute presents a question of substantial importance. Where the meaning of "loyalty" is not limited to a specified content defined by Congress, it permits individual judgment of a political character. Thus, petitioner is regarded as disloyal solely because of the Commission's disapproval of his political judgment concerning the significance of the belligerency of a friendly nation. It cannot be doubted that the Civil Service Commission's doubts as to the loyalty of employees is, in all sincerity, conditioned by the extent that the poltical opinions of the employees are distasteful to the individual members of the Commission. Other agencies do likewise and the standard of "reasonable doubt as to loyalty" means whatever an administrative agency sees fit to make it mean. The instant case is illuminating on this point. The Civil Service Commission vehemently asserts its doubts as to the petitioner's loyalty, while the

War Manpower Commission and its predecessor, the Office for Emergency Management, on exactly identical facts, and with more personal knowledge of the petitioner, together with the Civil Service Commission's Board of Appeals and Review, affirmed that the petitioner was unquestionably loyal and should be retained in the Government service. And, of course, the instant situation is not an isolated one.

It is clear from the record of this case that not only was the Civil Service Commission not dealing with doubt as to loyalty but that in fact its entire policy was based upon ousting political "undesirables" known not to be disloyal. Its acknowledged departure from congressional standards is emphasized by the procedures established for handling cases arising under its own administrative definition of disloyalty.

The "usual policy" of the Civil Service Commission (R. 51) is to permit persons charged with disloyalty to remain on their jobs pending administrative appeal. It must seem strange that the Commission on the one hand claims that it was dealing with dangerous and unreliable elements, and on the other hand establishes a procedure which in this case kept the petitioner in the employ of the Government for almost two years after the Commission made its decision that he was of doubtful loyalty. While the Commission first requested petitioner's dismissal on October 27, 1942 (R. 54), it permitted him to remain on his job pending investigation by his employing agencies and administrative appeal (R. 50-51, 54-56), so that the petitioner's actual dismissal did not occur until September 12, 1944 (R. 4).

The two war agencies employing petitioner, with personal, on-the-job familiarity with him, cognizant of the facts on which the Commission based its conclusion, and after inquiries which they independently undertook about him, resisted his ouster and repeatedly requested the Commission to reverse itself (R. 32-33). The Commission's Board of Appeals and Review, after hearing petitioner's appeal and observing him and the witnesses in his behalf,

testifying under oath, recommended his exoneration and retention (R. 32). And when, after a final appeal, the Commission remained unyielding in its conclusion, it nevertheless acquiesced in the request of petitioner's war agency that he remain on his job for a further period to complete "unfinished work" (R. 60-61).

These actions by the Commission are utterly inconsistent with its asserted doubts as to petitioner's loyalty. When viewed against the reasons given in the Commission's letter for its ordering petitioner's dismissal, it is clearer than ever that its determination was based solely on disapproval of petitioner's political views and affiliation as distinguished from doubts of his loyalty. If in fact the Civil Service Commission had any genuine doubt as to the petitioner's loyalty on a proper and lawful standard of loyalty, it would have been derelict in its duty if, during a period of war, it permitted the petitioner to remain on his job for a period of two years in a war agency. Certainly if it were proceeding against an individual who was considered as running afoul of the congressional definition of disloyalty, the above procedures would be inconceivable. That they were followed here is convincing evidence that the standard applied by the Commission was not one of loyalty, as specified by Congress, but rather of political conformity.

The Congress carefully adopted a standard of loyalty in specific terms, and eschewed vagueness, precisely because it realized the danger of permitting the subjective political judgment of different Government officers to become the standard for determining loyalty. We urge that the Congress adopted a definition of loyalty, that the Civil Service Commission exceeded its powers by dismissing petitioner for alleged disloyalty on an administrative definition different from that of the Congress, and that the Commission's administrative concept of loyalty violates specific statutory provisions protecting petitioner's freedom of opinion.

The question of the power of the Civil Service Commission so to expand its jurisdiction by constructing an

administrative test of loyalty and the extent to which that jurisdiction is limited by the congressional standards and other legislation with respect to loyalty are questions of undoubted importance which have not been and should be passed upon by this Court.

III

All of the statutory protections of the political freedom of Federal employees are elaborations of the basic protection of freedom of speech and political opinion safeguarded by the First and Fifth Amendments to the Constitution. Concededly Government employment is not a right which every citizen may demand irrespective of his qualifications, and reasonable requirements as to such employment are undoubtedly in the discretion of the officers charged with its management. But, as with any official privilege, these officers may not constitutionally set up subjective political tests to grant or withhold it, especially where the tests are designed to exclude persons holding lawful social, political o economic views. *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146. There are constitutional limitations on the extent to which the Government may impose restrictions on its employees in the guise of establishing qualifications for their job. The Court below, however, has laid down without limitation, the broad statement that the United States "has the right to prescribe the qualifications of its employees and to attach conditions to their employment" (R. 76).

In *People* v. *Crane*, 214 N. Y. 154, 108 N. E. 427, *aff'd* 239 U. S. 195, Judge Cardozo said that a citizen could not be disqualified from public employment because of faith or color. And in his message approving the Hatch Act, President Roosevelt expressed his agreement with the view of the Attorney General that—

> "* * * qualifications (for Government service) cannot properly preclude government employees from the exercise of the right of free speech." 84 Cong. Record 10,746 (1939).

The present case presents a question of basic civil liberties and raises the issue whether Government employees can protect their civil rights as guaranted under the Constitution, by recourse to the Court. The witch-hunt which is now proceeding in the Government service and elsewhere, and which is not without precedent in earlier prewar and post-war periods (cf. *Colyer* v. *Skeffington*, 265 Fed. 17, 1920, reversed as to some of the petitioners, 277 Fed. 129; Chafee, *"A Contemporary State Trial—U. S.* v. *Abrams,"* 33 Harv. Law Rev. [1920] 747) represents a serious threat to the freedom of opinion of Government employees. See William Shirer, *"Will 1920 Repeat; Another Red Scare Foreseen,"* N. Y. Herald Tribune, October 20, 1946.

Federal employees' rights of freedom of opinion are guaranteed by the Constitution. However, it is a simple matter to distort opinions of Federal employees which are unpopular into a charge of disloyalty. The instant case presents a clear example of the use of proper and lawful political opinion properly and lawfully expressed as proof of "doubt as to loyalty."

Petitioner was generally opposed to this country's participation in the war in Europe prior to the summer of 1941. He changed his mind at that time and one of the events influencing him was the involvement of Russia in the war. He felt this to be a significant factor affecting the safety and interests of the United States, which he fully explained to the Board of Appeals and Review of the Civil Service Commission. These political opinions of the petitioner nevertheless led to a decision by the Commission that his loyalty was doubtful. In essence the Commission's test of loyalty is that any person who, prior to the summer of 1941, believed it desirable to remain out of the war in Europe, and who changed his mind during the summer of 1941, may be a disloyal person (*supra*, pp. 15-16). The fear is (a) that such a person may have changed his views because of Russia's engagement in the war and (b) this then is interpreted into an allegation of his greater concern for the interests of Russia than those of the United States.

As applied to the petitioner, this last interpretive twist as to his excessive interest in a foreign power is manufactured out of whole cloth and is derived entirely from the political thoughts of the members of the Civil Service Commission. This is neither an analysis nor a finding of fact. It is simply a subjective political judgment of the individual Commissioners.

The standard devised by the Commission exposes to the imputation of disloyalty the views of innumerable citizens whenever they express any opinions on foreign affairs, especially on an issue that is once as profound and delicate as American participation in a war. With this approach many could be condemned as following a "British party line", a "French party line",[10] a Spanish party line", etc.

Men such as Judge Jerome N. Frank of the Second Circuit and George Wharton Pepper, who changed their minds as to the desirability of the American participation in the recent war in relation to the fortunes of France and England, may, under the test devised by the Civil Service Commission, have their loyalty doubted.[11] The very test here involved would cast aspersions on the loyalty of Chester Bowles, former Price Administrator and Director of Economic Stabilization. He joined the American First Committee in 1940 and subsequently changed his mind, the change being occasioned by the attack on Russia on June 22, 1941. He stated (PM Sunday Magazine, October 20, 1946, p. 16):

> "Until 1941 I thought of it (Hitlerism) as a passing phase, a local middle-European phenomenon, a bad

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[10] In fact, in the Jeffersonian era the Federalists were commonly referred to as the "English party" and the Jeffersonians as the "French party". And the odious Alien and Sedition Acts passed during the Madison administration represented an effort by the "English party" to curb the "French party" in the expression of its views. 2 Beveridge, *Life of John Marshall* (1916), 311-312, 319, 332, 383, n. 2.

[11] See Frank, *If Men Were Angels* (1942), page 332, note; Pepper, *Philadelphia Lawyer* (1944), 272-273.

answer to prolonged economic misery. When Hitler invaded Russia, although I am certainly no Communist, I realized that here was proof that it was more than an ordinary clash of old-world powers."

The grant to any official of a Government agency of the right to determine loyalty or disloyalty upon the basis of political opinion of citizens means an end to freedom of opinion of those who are subject to the power of such an agency. For doubts as to the loyalty of many groups are freely expressed wherever those groups are unpopular. Thus large segments of opinion regard Catholics as disloyal to this country and loyal only to Rome. Jews have been stigmatized as loyal to the interests of their coreligionists in disregard of the interest of the United States. Various national groups have been attacked as primarily loyal to the lands of their forebears. Opinion to the left of any speaker is frequently regarded as Communist and therefor disloyal, while opinion to the right of him is Fascist and disloyal for that reason.

The test laid down in this case by the Civil Service Commission is not the only one which can be applied if the decision of the Court below is to stand. For the Civil Service Commission can then proceed to erect new tests as to political opinion which it believes create "reasonable doubt" as to loyalty. Thus, preoccupation with our difficulties with Russia may cause the Commission to entertain a "reasonable doubt" as to the loyalty of any person who, for example, advocates turning our atomic bomb secret over to the United Nations, for then such secrets would be available to Russia. This would place that large segment of opinion which supported Henry Wallace's reported proposal for turning the atomic bomb secret over to Russia (N. Y. Times, September 22, 1945) in the category of proscribed disloyal persons ineligible for Federal employment. In fact, any political view on matters relating to foreign policy and perhaps domestic policy, which might be regarded, however honestly,

by three individuals who constitute the Civil Service Commission, as an indication of disloyalty, might bar from Federal employment large sections of the population. Thus a majority of the Civil Service Commissioners, who by statute may be and usually are adherents of particular parties,[12] would under such a test be given unlimited power to attribute disloyalty to the party out of office. Powerful political parties as well as unpopular minorities may be designated as disloyal by their opponents. We have just come through a campaign in which precisely this type of charge was commonly levelled by one political party against its opposition.

To permit the use of political opinion as a test of loyalty invites the official imposition of political orthodoxy on Federal employees in violation of the opinions of this Court. See *West Virginia* v. *Barnette,* 319 U. S. 624 at 642:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox, in politics, nationalism, religion or other matters of opinion."

The extent of constitutional protection to the free expression of political opinion by Federal employees is directly raised by this case. The Court below, in disregarding this constitutional protection, erroneously decided a constitutional question of substance which has not been but which should be settled by this Court.

IV

The Court below refused to examine petitioner's charges that his dismissal violated the statutory and constitutional protections cited above. It stated that the question of dis-

[12] Section 1 of the Civil Service Act provides that no more than two shall be adherents of the same political party. 22 Stat. 403, 5 U. S. C. Sec. 632.

missal of Federal employees involves internal management affairs in which the Court would not interfere. The Court stated specifically that it was beyond its province to review the action of the Civil Service Commission (R. 76). Thus violations of statutory and constitutional rights were held not to be proper subjects of inquiry by the Court because they involved matters of internal management of Government agencies. Such a ruling is obviously of substantial importance, since it affects the protection guaranteed by statute and the Constitution to Government employees and since "civil servants' rights of tenure are undoubtedly matters of substance." See petition of the Government at page 14, in *United States* v. *Elchibegof, supra.*

The opinion of the Court of Appeals is in conflict with an applicable decision of this Court. In refusing to redress violations of statutory and constitutional rights, the Court below departed from the rule laid down by this Court in *United States* v. *Wickersham*, 201 U. S. 390. It also violated the general rules applicable to judicial review of administrative action which have been reaffirmed recently in Section 10 of the Administrative Procedure Act.

In *United States* v. *Wickersham* this Court held that the dismissal of a Federal employee in violation of a rule prescribed by presidential order "was without legal effect", 201 U. S. at 398. The Court inquired in some detail as to such internal managerial matters as the prescribed dismissal procedure the question of whether the action against the employee was a "suspension" or a "dismissal" (at 396-397), and which of the employee's superiors was empowered to effectuate his discharge. The case is a clear holding that the dismissal of a Government worker in violation of a presidential order—and a fortiori, one may assume, in violation of the Constitution and statute—presents a case for judicial review and correction.

Section 10 of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C., Sec. 1009, provides that except where judicial review is specifically precluded by statute or where agency action is by law committed to agency discretion, "any per-

son suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof". The scope of that review is set forth in Section 10(e) of the Act, which states that the reviewing Court shall hold unlawful and set aside action found to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right * * *." This Act is a reaffirmation of pre-existing principles [12a] and was in effect at the time the decision of the Court of Appeals was made. Section 10 is subject to no exception for Government personnel functions.[13]

The issue presented by this case is the extent of the examination which Courts may or must make of the rights of Federal employees dismissed in alleged violation of statutory and constitutional guarantees. This case is thus a companion piece of the *Elchibegof* case. Since that case has been withdrawn by the Government, the instant case alone presents for consideration the questions which led to the granting of the writ in the *Elchibegof* case.

The opinion of the Court below is not in any way limited to the fact that the petitioner, an employee of nine years' standing, is claimed not to have had permanent Civil Service status. The statutory rights, violation of which was charged in his dismissal, apply by their terms to all employees of the Federal Government whether or not they have permanent Civil Service status. Indeed, for example,

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[12a] See "Appendix to Attorney General's Statement * * *" on 5.7, in Sen. Rep. 752, 79th Cong., 1st Sess. (1945), p. 44.

[13] Exceptions for matters involving personnel and agency management or to public property, loans, grants, benefits or contracts, are exceptions from the procedural requirements with relation to rule making only. Section 4 of the Act. Section 5 dealing with adjudication also does not apply to the selection or tenure of an officer or employee of the United States. *None of these exceptions, however, apply to Section 10, the judicial review section.*

the Hatch Act provisions in question, contained in Section 9(a), were adopted to apply specifically to those Federal employees who, like petitioner, did not have a permanent Civil Service status. Hatch Act, Sec. 15, 54 Stat. 767, 18 U. S. C., Sec. 61O. And Rule I, Sec. 2, *supra*, p. 12, by its terms, bars political discrimination even as against applicants.

The Court below in refusing to review the violations of law and the Constitution by the Civil Service Commission in this case, cited in support of its action the cases of *Decatur* v. *Paulding*, 39 U. S. (14 Pet.) 496, and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. In so doing, however, the Court overlooked the fact that *United States* v. *Wickersham, supra*, specifically held that the matter of a dismissal of a Federal employee in violation of specific safeguards for his benefit was the type of "internal" matter for which judicial protection is available. The decision below that there may not be review by the Court of violation of statutory and constitutional protections, granted Government employees, if permitted to stand, will permit the elimination in practice of all the provisions enacted for the protection of such employees.

For example, the ban on the spoils system stems from the Civil Service Act and Rule I, Section 2, *supra*. If an employee entitled to the protection of these provisions happens to be a Republican and is dismissed for that reason by a Democratic administration, the Court below has held itself powerless to correct that illegality, because it involves internal personnel management. In practice an effort would presumably be made to mask a discharge on such political grounds by the assertion that the employee is inefficient and that his dismissal will "promote the efficiency of (the) service", adequate ground for dismissal of a classified civil service employee under Section 6 of the Lloyd-LaFollette Act, 37 Stat. 555, 5 U. S. C., Sec. 652. But under the decision below, even if the dismissing agency admits that the employee's inefficiency consists solely of his superior's belief that the Republican employee is incompetent to serve in a Democratic Administration, the

Court is powerless to act, because the matter involves "internal" administration.

The Civil Service rule also bans discrimination in Federal employment on religious grounds. Suppose again that an employee's dismissal is sought to be justified as promoting the efficiency of the service, but it can be established that the employee is a devotee of a faith to which a number of his co-workers are hostile, and his superior admits that the discharge was based solely on a belief that such action would reduce office friction. Here, too, the decision of the Court below makes impossible the enforcement of the rule.

The point at issue here does not concern a case where there is a dispute as to whether the discharge was in fact for reasons proscribed by statute. We are concerned only with cases where it is admitted, as it is here, that the employee was dismissed because of his political views.

Any conclusion other than that providing for judicial review would render illusory the safeguards conferred by the statutes governing Federal employment. If infractions are to be shrugged off by the Courts as internal executive matters, these rights would lose their meaning. The doctrine of the *Wickersham* case preserves these rights by subjecting executive violations to judicial review. The Court below erred in disregarding it.

It is submitted that the vast powers to nullify statutory and constitutional protections, which the decision below grants to the executive, should not be so yielded, particularly where matters of fundamental freedom of speech and opinion are involved, without examination by this Court of the limit of these powers.

V

The witch-hunt which resulted in petitioner's dismissal is not over and will not be over even if within the next year or two the procedure of War Service appointments and appointments "subject to investigation" should be aban-

doned. For loyalty tests will apparently be with us for some time to come. Besides the general congressional preoccupation with the matter, there is a permanent Committee on Un-American Activities of the House primarily concerned with the opinions of Federal employees. Moreover, the executive has appointed a committee which will soon have a report recommending "what standards are desirable for judging the loyalty of employees of the Government and applicants for such employment" (Par. 3(d) of Executive Order 9806, *supra,* n. 8).

To turn control of political thoughts over to the Civil Service Commission or to some other presidential commission on loyalty, will result in a civil service not bold to examine the truth but rather timid and fearful, lest its opinions be regarded as unorthodox and its security jeopardized. The devitalizing effects of the witch-hunts which have gone by can be felt throughout the Government service.[14] Government employees are now fearful to mention, even in casual conversation, or in drawing rooms, ideas which may be regarded as unorthodox.[15] Views on foreign policy and economic matters are expressed only in the most carefully guarded terms. The efficiency of the Government service cannot but be impaired in this atmosphere of a campaign of terror.

Whatever legitimate inquiries there may be for security purposes concerning loyalty, the scope of the concept of

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[14] President Mitchell of the Civil Service Commission has stated that 1,299 people were held ineligible for government service on the grounds of disloyalty from the beginning of the period of war emergency until August 31, 1946. In the same address President Mitchell stated: "Admittedly much of the evidence which the Commission had before it was obtained in confidence and could not have been secured if it had to be produced in open court. For that reason many of these persons could not have been convicted as disloyal in an open trial". Address before the National League of Postmasters, San Francisco, October 24, 1946.

[15] *Snooping on the Potomac,* by Henry F. Pringle, Saturday Evening Post, January 15, 1944; *Red Baiting in Washington,* by Gerhard Gesele and Charles A. Horsky, New Republic, June 8, 1942.

loyalty in relation to freedom of speech and opinion is an important question which has never been passed on by this Court and which should be decided.

VI

The present case presents an important question concerning the allocation of powers between the Civil Service Commission and the other departments and agencies of the Government. The Civil Service Commission in this situation has maintained and exercised a power to dictate to the War Manpower Commission and to other agencies of the Government the dismissal of employees which the employing agency desires to retain. As shown above, petitioner was an exceptionally capable employee of the Government. The Office for Emergency Management and the Chairman of the War Manpower Commission, after investigation, spent every effort to retain him on their payrolls, thus indicating their unqualified belief that the good of the service required his retention. Nevertheless, the Civil Service Commission directed dismissal of this employee.

Perhaps no principle of governmental administration is more firmly established than the doctrine that the power to appoint carries with it the power to dismiss and that dismissal is a power granted only to the heads of the employing agencies. See the discussion in *Myers* v. *United States*, 272 U. S. 52, 109-172.[16] The present case presents a challenge by the Civil Service Commission to this general rule. The Commission in this case is asserting the right to act as an overall quasi-judicial agency to deter-

[16] The Executive Order creating the War Manpower Commission provides: "Within the limits of such funds as may be made available for that purpose, the Chairman (of the War Manpower Commission) may *appoint such personnel* and make provision for such supplies, facilities and services as may be necessary to carry out the provisions of this Order." Exec. Order 9139, April 18, 1942, C. F. R., Cum. Supp. (1943), Book 1, pp. 1145, 1146-1147 (emphasis supplied).

mine loyalty of Federal employees and to enforce its decision over the opposition of the heads of administrative departments of the Government who do not share its doubts as to loyalty of their employees.

The effect of this asserted power of the Civil Service Commission is far-reaching. The heads of Government agencies are entrusted with the responsibility for executing the functions of their departments. These responsibilities can be carried out only if control of personnel, with respect to retention on the payroll, rests in their hands. Execution of a program can be hampered by requiring the dismissal of the employees who are carrying it out, even more so than by a refusal to appoint an employee desired by an agency.[17] In the instant case the Chairman of the

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[17] Indeed the analysis of the *Myers* case, in distinguishing between the power of appointment and the power of removal, clearly indicates the reasons why the present regulations should be construed to permit the petitioner's loyalty to be judged by his employing agency and not by an outside group not having on-the-job familiarity with him. Thus, at pages 121, 122, this Court stated:

> "* * * the power of removal, though equally essential to the executive power, is different in its nature from that of appointment. * * * The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. * * *
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> "* * * When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may therefore be regarded as confined for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal."

War Manpower Commission urged before the Civil Service Commission, and obviously felt, that the dismissal of the petitioner would impair the functioning of his office.

The doctrine of responsibility of the heads of an agency for the functioning of his department, including his exclusive power to dismiss his own employees, was recognized in the *Myers* case, *supra,* and embodied in the Lloyd-LaFollette Act governing the rights of Federal employees on dismissal (37 Stat. 555, 5 U. S. C., Sec. 652). See also 30 Op. Atty. Gen. 79, 83; 21 Op. Atty. Gen. 355. The basic division of function represented by this doctrine is one which should not be regarded lightly as having been intended to be disturbed.

The device of an appointment subject to condition, here sought to be utilized, cannot be used to avoid this basic rule of the distribution of power between the Civil Service Commission and the other agencies of the Government. *Wolff* v. *Hodson,* 285 N. Y. 196, 33 N. E. 2d 90.

The question of the allocation of responsibility for dismissal of personnel among the agencies of the Government is a question of great importance, which in the context of the regulation here involved, has not been decided by this Court. It is important that this Court should make a determination on this issue.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted.

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